No. 105, ORIGINAL

In The Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant,

UNITED STATES OF AMERICA,

Defendant-Intervenor.

On Exceptions To The Fifth And Final Report Of The Special Master

COLORADO'S REPLY IN OPPOSITION TO KANSAS' EXCEPTION

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I. STATEMENT

On December 7, 2004, the Court overruled Kansas' exceptions to the Fourth Report of Special Master Arthur L. Littleworth in this long-running water dispute, accepted the Special Master's recommendations, and remanded the case for preparation of a decree consistent with its opinion. *Kansas v. Colorado*, 543 U.S. 86, 106 (2004). At the end of January 2008, Special Master Littleworth submitted his Fifth and Final Report ("Final Report"). The Final Report includes a proposed Judgment and Decree, which, he states, "is crafted with the firm intent to end the 100 year history of litigation over rights to the Arkansas River." 1 Final Report 1. Colorado strongly supports the Special Master's stated intent.

The proposed Judgment and Decree includes a Dispute Resolution Procedure that includes arbitration if the States cannot agree. 2 Final Report 5 & Appendix H. Previously, the Special Master had proposed binding arbitration of any future dispute related to the H-I model, but Kansas had declined. Fourth Report 135; *see Kansas v. Colorado*, 543 U.S. at 93-94 (discussing the possibility of resolving future technical disputes through arbitration). In the proposed Judgment and Decree, the States have agreed to binding arbitration of many issues prior to December 31, 2016. 2 Final Report, Appendix H at H.8. All other issues will be submitted to non-binding arbitration unless the States agree in writing to submit the issues to binding arbitration. *Id.*, at H.9. Colorado hopes that with time, Kansas will become more

comfortable with the Dispute Resolution Procedure and agree to an extension of binding arbitration of issues arising under the Decree.

The Special Master explains the reasons why a decree could not be submitted immediately following the remand in 2004, including the fact that he had recommended a ten-year accounting period using the H-I model to determine compliance with the Arkansas River Compact, which the Court had approved in its 2004 opinion. 1 Final Report 1-3. The first ten years of model results were not available until 2007 and other issues needed to be determined. *Id.*, at 1. The proposed Decree includes the results from the first ten-year period that began with 1997 when Colorado's Use Rules became fully effective and ended with calendar year 2006. *Id.*, at 3-4. Colorado was in compact compliance at the end of the first ten-year period, and, as the Special Master notes, the accounting showed accretions (increases) to usable Stateline flows of 3,882 acre-feet. *Id.*, at 4. Under the approved ten-year accounting procedure, a determination of whether Colorado owes Kansas water in 2008 will be made by taking the model's total results for the years 1998-2007. For 2009, the determination will be made using the model's total results for the years 1999-2008, and so forth. *See id.*; *Kansas v. Colorado*, 543 U.S. at 99-100.

The proposed Judgment and Decree includes thirteen Appendices (A through M) that, among other things, specify accounting procedures using the ten-year accounting (Appendix A) and procedures for

annual updates to the H-I model (Appendix B). Notably, Section V of Appendix B includes procedures for proposing changes to the H-I model, a source of considerable disagreement between the States in the past. *E.g.*, Fourth Report 80-92; *Kansas v. Colorado*, 543 U.S. at 99 (noting that the model's ability to calculate depletions had proved highly controversial, leading to many model modifications during the litigation). If the States cannot agree on such changes, they are subject to the Dispute Resolution Procedure. 2 Final Report, Appendix B at B.20.

Following the remand, the Special Master approved a schedule to resolve issues that were still in dispute. 1 Final Report, App. 1-3. Colorado urged that the experts for the States be assigned greater responsibility for discussing and resolving issues. *Id.*, at App. 3; *see Kansas v. Colorado*, 543 U.S. at 106 (expressing the hope that expert discussion, negotiation, and, if necessary, binding arbitration would lead to resolution of any remaining disputes). The Special Master agreed, *id.*, App. 4, and this approach ultimately bore fruit in a series of agreements between the Chief Engineer of Kansas and the State Engineer of Colorado to resolve issues. *Id.*, App. 21. The Special Master graciously acknowledges the efforts of these State officials in resolving disputed issues, 1 Final Report 23-24, but the Special Master deserves a substantial measure of the credit for his firm insistence on resolution of these issues. *Id.*, App. 3-4, 20-23. Also, for the first time, the States have prepared documentation for the H-I model, which is included in

Volume III of the Final Report. This will greatly assist new State officials and experts, as well as arbitrators, if required.

In summary, the Final Report includes a proposed Judgment and Decree consistent with the Court's 2004 opinion. The Special Master recommends that the Court approve his orders and the entry of the proposed Judgment and Decree. 1 Final Report 26. Neither State has taken exception to these recommendations, except for Kansas' exception to the amount of costs. Thus, the only remaining issue for the Court to resolve is whether the Special Master was correct in ruling that 28 U.S.C. § 1821(b) limits costs for expert witness fees in this case.

II. ARGUMENT

A. The Special Master Correctly Determined That 28 U.S.C. § 1821(b) Limits The Award Of Costs For Expert Witness Fees In This Case.

As with other issues in this long-running case, the Special Master gave careful consideration to Kansas' argument that 28 U.S.C. § 1821(b) does not apply to the award of expert witness fees in this case. As the Special Master noted, there is no question that the $40 per day limit in § 1821(b) applies to expert witness costs in cases arising in the federal district courts: "That issue was settled in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987). In that decision the Supreme Court held that 'when a

prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of § 1821(b), absent contract or explicit statutory authority to the contrary.'" 1 Final Report, App. 95 (quoting *Crawford Fitting*, 482 U.S. at 439); *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 126 S.Ct. 2455, 2458, 2460 (2006); *West Virginia Hosps., Inc. v. Casey*, 499 U.S. 83, 86, 102 (1991).

Kansas does not challenge the application of § 1821(b) to lower federal courts. Instead, it argues that 28 U.S.C. § 1821(b) and § 1920 do not apply to the U.S. Supreme Court. As the Special Master pointed out, Kansas ignores the fact that both § 1821 and § 1920 use the term "court of the United States," which is expressly defined in 28 U.S.C. § 451 to include the Supreme Court. 1 Final Report, App. 96-97. As the Special Master said, "In the face of these explicit applications of the expert witness fee limits to the Supreme Court, it is hard to accept Kansas' claim that Congress made a calculated decision to exclude the Supreme Court from such limits. . . ." *Id.*, at App. 97 (internal quotations omitted).

Having determined that the $40 per day limit in § 1821(b) applied to the award of costs for expert witness fees in this case, the Special Master then concluded that the statute should be "liberally construed" to include days when expert witnesses were present in Court, but did not testify, such as days when experts were present to hear testimony and to assist counsel in cross-examination. *Id.*, at App. 99.

Since Kansas had experts present on virtually every day of the approximately 270 days of trial, and they were entitled to their travel, hotel, and other expenses under the Special Master's ruling, this somewhat offsets Kansas' claim that the $40 per day limit is unfair. The Special Master also ruled that an appropriate reduction should be applied for the additional expense and disruption caused by the withdrawal of Kansas' chief technical witness during the liability phase before his cross-examination was completed and the year-long continuance that resulted to allow Kansas to obtain replacement experts, correct errors in the H-I model, and present Kansas' replacement case. *Id.*, at App. 89, 99; *see* 2 First Report 236-38, 241. Based on the Special Master's rulings, the States agreed to an award of costs in the amount of $1,109,946.73, which Colorado has paid. 1 Final Report 5.

Kansas now argues that Congress has not sought to limit the award of costs in the Court's original jurisdiction. It argues that the 1853 Fee Act (Act of Feb. 26, 1853, 10 Stat. 161) was intended to regulate fees and costs only in the circuit and district courts of the United States, and that the Court in *Crawford Fitting* held that the present statutes (28 U.S.C. §§ 1821 and 1920) were brought forward intact from the 1853 Fee Act. Brief in Support of Kansas' Exception ("Kansas' Brief") at 14-15, 19-23. This argument ignores the addition of a definition of the term "court of the United States" in § 451 of title 28

of the Judicial Code of 1948 and is based on a misreading of *Crawford Fitting*.

28 U.S.C. § 451 defines the term "court of the United States" for the purposes of title 28 of the U.S. Code. It states, in pertinent part, as follows:

> "As used in this title:
>
> *The term 'court of the United States' includes the Supreme Court of the United States*, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior." (Emphasis added.)

28 U.S.C. § 1821 uses the term "court of the United States" in specifying the fees and allowances that shall be paid to witnesses and specifically incorporates the courts listed in § 451:

> "(a)(1) Except as otherwise provided by law, a witness in attendance at any *court of the United States*, or before a United States Magistrate Judge, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
>
> (2) *As used in this section, the term 'court of the United States' includes*, in addition to *the courts listed in section 451 of this title*, any court created by Act of Congress in a territory which is invested with any

jurisdiction of a district court of the United States.

(b) *A witness shall be paid an attendance fee of $40 per day for each day's attendance.* A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance." (Emphasis added.)

28 U.S.C. § 1920 also uses the term "court of the United States." It provides as follows:

"A judge or clerk of any *court of the United States* may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) *Fees and disbursements for* printing and *witnesses*;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree." (Emphasis added.)

Kansas' argument that Congress intended to exclude the Supreme Court from the limit on expert witness fees in § 1821(b) is based on the 1853 Fee Act and a statement from *Crawford Fitting*. First, Kansas states that Congress enacted the 1853 Fee Act to regulate fees and costs in the circuit and district courts. Kansas' Brief at 14; *see also id.* at 19-22, 26.[1] Next, Kansas states that two years later, in *Florida v. Georgia*, 17 How. (58 U.S.) 478, 491 (1855), the Court said there was no act of Congress dealing with procedure in the original jurisdiction of the Court. Kansas' Brief at 14. Kansas argues that since this decision was entered only two years after the adoption of the 1853 Fee Act, the Court "*in essence* found that there was no provision in the 1853 Fee Act controlling procedure in the original jurisdiction of the Court." *Id.* (emphasis added). In *Florida v. Georgia*, however, the Court did not address, and had no occasion to

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[1] Kansas relies in part on the title of the 1853 Fee Act for its argument that Congress intended the 1853 Fee Act to apply only to the circuit and district courts. Kansas' Brief at 21-22. This is by no means clear. The title also included "other Purposes," *see id.*, at 22, and the Act also referred to "the United States courts" in the first sentence, 10 Stat. 161, and "court of the United States" elsewhere, 10 Stat. 162, in addition to "the circuit and district courts." Whatever the intent in 1853, however, Congress clarified its intent by the addition of a definition of the term "court of the United States" in § 451 of title 28 of the Judicial Code of 1948. Act of June 25, 1948, 62 Stat. 869, 907.

address, the issue of whether the witness fee and costs provisions of the 1853 Fee Act applied to this Court. The issue in that case was whether the Attorney General of the United States could intervene in a case in this Court involving a boundary question between two states. 58 U.S. at 495-96. Regardless, even if the witness fee and costs provisions of the 1853 Fee Act applied only to the circuit and district courts in 1853, which is by no means clear, Congress clarified its intent when it added a definition of the term "court of the United States" in 28 U.S.C. § 451, a term that appears in both § 1821 and § 1920.

The statement Kansas relies on from *Crawford Fitting* does not support its argument. Kansas acknowledges that in *Crawford Fitting* this Court held that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of § 1821(b), absent contract or explicit statutory authority to the contrary." 482 U.S., at 439; Kansas' Brief at 11. However, Kansas argues that *Crawford Fitting* held that the present statutes, 28 U.S.C. §§ 1821 and 1920, "were brought forward intact from the 1853 Fee Act." Kansas' Brief at 14. Thus, Kansas contends that, notwithstanding the use of the term "court of the United States" in § 1821 and § 1920, those statutes apply only to the district and circuit courts. *Id.*; *see also id.*, at 25-26. This argument will not stand scrutiny.

The Court in *Crawford Fitting* did not state that § 1821 and § 1920 were brought forward "intact" from the 1853 Fee Act. Instead, the Court said, "The

sweeping reforms of the 1853 Act have been carried forward to today, 'without any apparent intent to change the controlling rules.'" 482 U.S. at 440 (quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 255 (1975)). The "controlling rules" referred to by the Court were those governing fees and the taxation of fees as costs in federal courts. Citing its earlier decision in *Alyeska Pipeline*, the Court said that by 1853 there was a "great diversity in practice among the [federal] courts" and "losing litigants were being unfairly saddled with exorbitant fees." *Id.* (quoting *Alyeska Pipeline*, 421 U.S. at 251). The Court said, "Accordingly, Congress returned to the issue [in the 1853 Fee Act] and comprehensively regulated fees and the taxation of fees as costs in the federal courts." 482 U.S. at 440.[2] "The resulting 1853 Fee Act 'was a far-reaching Act specifying in detail the nature and amount of the taxable items of cost in the federal courts.'" *Id.* (quoting *Alyeska Pipeline*, 421 U.S. at 251-52). The Court concluded: "Title 28 U.S.C. § 1920 now embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party." *Id.* The Court in

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[2] In *Alyeska Pipeline*, the Court reviewed the history of the award of costs and attorneys' fees at common law and in the federal courts. The Court noted that in 1853, Congress undertook to standardize the costs allowable in federal litigation. 421 U.S. at 251. The Court noted that the 1853 Fee Act was carried forward in subsequent revised statutes and that "[i]ts substance, without any apparent intent to change the controlling rules, was also included in the Revised Code of 1948 as 28 U.S.C. §§ 1920 and 1923(a)." *Id.*, at 255.

Crawford Fitting did not suggest, however, that there had been no revisions to the provisions of the 1853 Act governing fees and the taxation of fees as costs in subsequent statutes to clarify their coverage.

Given the addition of a definition of the term "court of the United States" in § 451 of title 28 of the Judicial Code of 1948 (Act of June 25, 1948, 62 Stat. 869, 907), a term that expressly includes the United States Supreme Court, and given that the term "court of the United States" is used in both § 1821(b) and § 1920, Kansas' argument is simply a contrived effort to get around the plain meaning of the term "court of the United States" to avoid the limitation on expert witness fees in § 1821(b).

B. Kansas' Argument That 28 U.S.C. § 1920 Does Not Apply To This Court Because It Uses The Word "Judge" Ignores The Remaining Language Of The Statute.

Next, Kansas argues that the Special Master incorrectly relied on the definition of the term "court of the United States" in 28 U.S.C. § 451 to support his conclusion. Kansas' Brief at 23. Kansas contends that this term is used in a prepositional phrase in § 1920 and argues that the Special Master allowed this prepositional phrase to override the noun "judge" in § 1920. *Id.* Kansas argues that the prepositional phrase "of any court of the United States" cannot change the word "judge" into "justice." *Id.* at 24. In

support of its argument, Kansas states that the term "justice" is separately defined in § 451; thus, Kansas argues that if Congress had intended for § 1920 to apply to proceedings in the Supreme Court, it would have used the term "justice." *Id.*

As the Special Master pointed out, Kansas ignores the remaining language of the statute. 1 Final Report, App. 96. The first sentence in § 1920 includes the term "court of the United States." The term "court of the United States" is defined in § 451 to include the Supreme Court. The terms "judge of the United States" and "justice of the United States" are also defined in 28 U.S.C. § 451, but neither of those terms is used in § 1920. Instead, § 1920 refers to a "judge" or "clerk" of any "court of the United States." Since the term "court of the United States" is defined to include the Supreme Court, and § 1920 does not use the term "judge of the United States," the Special Master correctly determined that the word "judge" in § 1920 is broad enough to include a justice of the Supreme Court. 1 Final Report, App. 96.[5] Otherwise,

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[5] For example, Article III, Section 1, of the U.S. Constitution states: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior. . . ." Thus, the word "judge" can include a justice of the Supreme Court. Congress has also used the word "judges" when referring to justices of the Supreme Court and judges of the lower federal courts. *E.g.*, section 727 of Title XIII of the Revised Statutes of 1874, 18 Stat. 138 ("The judges of the Supreme Court and of the circuit and district courts, the commissioners of the circuit courts, and the judges and other magistrates of the several States. . . .").

there would be a conflict in that § 1920 would apply to the clerk of the Supreme Court but not to a "justice" of the Supreme Court because a "justice" is not a "judge." No such conflict occurs because § 1920 does not use the term "judge of the United States" – the term defined in § 451; it simply uses the word "judge." The word "judge" in § 1920 therefore does not exclude justices of the Supreme Court.

Furthermore, the use of the word "judge" in § 1920 makes sense when one considers the alternative of using the terms defined in § 451 in § 1920, viz, "A justice of the United States or a judge of the United States or a clerk of any court of the United States may tax as costs the following: . . . " Whatever gain in precision this language would have achieved is at the expense of brevity; the phrase "of the United States" has to be repeated three times in the subject of the sentence. The use of the word "judge" in § 1920 is therefore understandable.

C. 28 U.S.C. § 1911 Is Limited To Fees To Be Charged By The Supreme Court Clerk, Costs Of Serving Process, And Incidental Disbursements; It Does Not Cover Expert Witness Fees.

Kansas also argues that in 28 U.S.C. § 1911, Congress recognized the Supreme Court's inherent authority to tax costs as it deems appropriate. Kansas' Brief at 26. Kansas argues that § 1911 therefore confirms that Congress did not intend for § 1920 to

apply to cases of original jurisdiction in the Supreme Court. *Id.* The Special Master did not find Kansas' argument persuasive. 1 Final Report, App. 97. He pointed out that the first sentence of § 1911 applies only to "the fees to be charged by its [the Supreme Court] clerk." *Id.* The second sentence of § 1911 refers to the "fees of the clerk, cost of serving process, and other necessary disbursements incidental to any case before the court." As the Special Master noted, § 1911 covers only "incidental" disbursements and "fees to be charged by its clerk." *Id.* He therefore concluded that expert witness fees were not intended to be covered because expert witness fees are not "incidental" and would not be set by the clerk. *Id.*, App. 97-98.

Moreover, when § 1911 is read together with § 1821 and § 1920, it is apparent § 1821 specifies the amount of the fee that must be tendered to a witness in any "court of the United States" and § 1920 provides that the fee may be taxed as a cost by a "judge" or "clerk" of any "court of the United States." *Crawford Fitting*, 482 U.S. at 441. Congress then addressed the fees to be charged by the Supreme Court's clerk, the cost of serving process, and other necessary disbursements incidental to any case before the Court in § 1911. This is similar to § 1913, which specifies that the fees and costs to be charged and collected in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States and that such fees and costs shall be reasonable and uniform in all circuits. 28 U.S.C. § 1913. *See also* 28 U.S.C. § 1914 (setting filing fees and providing that

additional fees to be collected by the clerk of each district court shall be only as are prescribed by the Judicial Conference of the United States). These provisions for setting fees and costs clearly do not override § 1821(b) or § 1920. Otherwise, they would render § 1821 and § 1920 without meaning. *See Crawford Fitting*, 482 U.S. at 442.

D. Congress May Regulate Expert Witness Fees In Cases Within The Court's Original Jurisdiction.

Next, Kansas argues that even if Congress intended to regulate the proceedings of the Supreme Court in cases of original jurisdiction with respect to expert witness fees, it could not do so because the founders of the Constitution did not grant Congress the authority to regulate the Court's original jurisdiction. Kansas' Brief at 30-32. There is no precedent to support Kansas' argument.

In *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), the Court held that Congress could not prescribe that cases that the Constitution says are within the appellate jurisdiction of the Court shall be within the original jurisdiction of the Court and vice-versa. In *Florida v. Georgia*, 17 How. (58 U.S.) 478, 492 (1855), the Court held that legislation is not required for the Court to exercise its original jurisdiction. But, the Court has never suggested that Congress cannot regulate such matters as expert witness fees and the taxation of costs in proceedings before

the Court in cases of original jurisdiction. Two cases indicate just the opposite. In *Grayson v. Virginia*, 3 Dall. (3 U.S.) 320 (1796), the Court said, "The general rule prescribes to us an adoption of that practice, which is founded on the custom and usage of Courts of Admiralty and Equity, constituted on similar principles; but still, it is thought, that we are also authorised to make such deviations as are necessary to adapt the process and rules of the Court to the peculiar circumstances of this country, *subject to the interposition, alteration, and control, of the Legislature.*" 3 Dall. (3 U.S.) at 320 (footnote omitted) (emphasis added). And, in *Florida v. Georgia*, 58 U.S. 478 (1854), the Court stated:

> "But the constitution prescribes no particular mode of proceeding, nor is there any act of congress upon, the subject. And at a very early period of the government a doubt arose whether the court could exercise its original jurisdiction without a previous act of congress regulating the process and mode of proceeding. But the court, upon much consideration, held, that *although congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases, as fully as in any other court*, yet the omission to legislate on the subject could not deprive the court of the jurisdiction conferred; that it was a duty imposed upon the court; and *in the absence of any legislation by congress*, the court itself was authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which the jurisdiction was given."

58 U.S. at 491-92 (emphasis added); *see* 13 Fed. Prac. & Proc. Juris.2d *The Judicial Power of the United States* § 3525 (2008) ("[A]lthough Congress could legislate on the Court's process and mode of proceeding if it wished, it was the duty of the Court in the absence of congressional action to fill in procedural lacunae and to proceed with actions within its original jurisdiction."). In sum, there is no precedent to support Kansas' argument that the Constitution prohibits Congress from imposing a limit on expert witness fees in cases within the Court's original jurisdiction.

Moreover, there is a sound reason for having a uniform rule for costs for expert witnesses in federal courts, including the Supreme Court. The Court's original jurisdiction is not exclusive in all cases. 28 U.S.C. § 1251; *e.g.*, *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *Illinois v. City of Milwaukee*, 406 U.S. 91, 98 (1972). Therefore, it would not make sense to have different rules for expert witness costs in the lower federal courts and this Court in cases where this Court has concurrent jurisdiction. The availability of expert witness fees as costs can be a factor in the choice of forum for litigants, and there is no reason to make this Court a more attractive forum for litigants on that score. Nor does it make sense to have one rule for costs for expert witness fees in all federal courts except the Supreme Court. The considered choice of Congress to make witness fees and the taxation of fees as costs uniform in any "court of the United States" is supported by good sense and does not interfere with the exercise of the Court's original jurisdiction.

Kansas also relies upon a statement in *Texas v. New Mexico* to support its argument that the Court has "inherent authority in cases of original jurisdiction." Kansas' Brief at 34, citing 482 U.S. 124 (1987). In that case, New Mexico had relied on *Pierce v. United States*, 255 U.S. 398 (1921), to argue that post judgment interest could not be awarded absent statutory authority. The Court said, "But we are not bound by this rule in exercising our original jurisdiction." *Texas v. New Mexico*, 482 U.S., at 132 n.8. The rule referred to by the Court was not a statute enacted by Congress prohibiting the award of post judgment interest in the absence of statutory authority. Rather, it was a common law rule, and it was that common law rule that the Court said it was not bound by in exercising its original jurisdiction. The Court did not suggest that Congress could not set a uniform rate for post judgment interest for cases in any court of the United States, as it has done in the case of witness fees. By setting fees and allowances for witnesses in 28 U.S.C. § 1821 for any court of the United States, Congress has exercised its "undoubted[]" right to proscribe the mode of proceeding in cases in this Court. *Florida v. Georgia*, 58 U.S. (17 How.) at 492.

E. The Application Of 28 U.S.C. § 1821(b) Is Not Unfair In This Case.

Finally, assuming 28 U.S.C. § 1821(b) does not limit the taxation of expert witness fees as costs in this case, Kansas argues that reasonable costs should be awarded for its expert witness expenses in this

case because most of its expert witness expenses were related to the development of the H-I model, which it says was a "Herculean effort." Kansas' Brief at 36. Kansas argues that, as a downstream State, it lies at a distinct disadvantage in relation to an upstream State and that developing the modeling necessary to evidence the upstream's misappropriation and overuse is a formidable task requiring extensive and expensive expert analysis and research. *Id.*, at 37. Kansas therefore argues that fairness and a need to preserve a balance between the interests of upstream and downstream States supports an award of actual expert witness fees where the expert witness evidence and modeling is adopted by the breaching party and relied on by the Court. *Id.*, at 37-38.

Assuming, *arguendo*, that § 1821(b) does not limit the taxation of expert witness fees as costs in this case, the reasons offered by Kansas do not justify an award of costs for expert witness fees in excess of the limit in 28 U.S.C. § 1821(b). First, Article IV-D of the Arkansas River Compact applies to future beneficial development in both Colorado and Kansas. Arkansas River Compact, 63 Stat. 145, 147; 2 First Report 304. Thus, the upstream/downstream State dichotomy that Kansas tries to portray is not always true. *See* 2 First Report 226-27 (discussing the ways post-compact pumping in Kansas could affect Colorado). Complex modeling was required to support Kansas' claims in this case because of the unique terms of Article IV-D of the Arkansas River Compact, which the States had agreed to and had been approved

by Congress. *See Kansas v. Colorado*, 514 U.S. 673, 683 (1995). Therefore, even if Kansas as the complaining State had to shoulder the burden of developing the evidence to prove its claim, that is no different than the burden shouldered by other plaintiffs. Awarding expert witness fees to States in excess of the limit in § 1821(b) might have the consequence of encouraging litigation by States in this Court rather than resolution of such disputes through negotiation and compromise, as this Court has often counseled. *See Texas v. New Mexico*, 462 U.S. 554, 575-76 (1983), and cases cited therein.

In this case, both States developed modeling to address Kansas' claims. 2 First Report 229-30, 264-65. Colorado agreed to adopt the H-I model in place of its own, but only after the Kansas replacement experts had corrected some 16 coding errors and inappropriate assumptions in the original H-I model that had been pointed out by Colorado's modeling expert, which substantially reduced Kansas' claim regarding post-compact well pumping and resulted in the dismissal of Kansas' claim regarding the Winter Water Storage Program. 2 First Report 235-36, 238, 241, 245, 314-16, 327-29, 335. Under those circumstances, Colorado's adoption of the H-I model to determine compact compliance should not be used as a reason to award expert witness fees as costs against Colorado in excess of the limit in § 1821(b). Otherwise, the Court would establish a precedent that would make it more difficult to get States to cooperate on technical matters in the future, hardly a precedent consistent

with the Court's admonishments that States should try to resolve disputes by negotiation rather than litigation.

III. CONCLUSION

The Special Master correctly determined that 28 U.S.C. § 1821(b) applies to the taxation of expert witness fees as costs in this case. Kansas' exception should be denied, and the Court should accept the Special Master's recommendations and enter the proposed Judgment and Decree.

Respectfully submitted,

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APPENDIX

Statutory Provisions Not Included in the Appendix to the Brief in Support of Kansas' Exception.

Title 28, U.S. Code

§ 1913. Court of appeals

The fees and costs to be charged and collected in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and uniform in all the circuits.

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§ 1914. District court; filing and miscellaneous fees; rules of court

(a) The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350, except that on application for a writ of habeas corpus the filing fee shall be $5.

(b) The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial Conference of the United States.

(c) Each district court by rule or standing order may require advance payment of fees.